IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 57 OF 2000

Shri Shivanath Baburao Walke,
businessman, major in age,
resident of Duler,
Mapusa, Goa. ... Appellant

versus

Miss Flora D'Souza,
spinster, resident of
Camarcazan,
Mapusa, Goa. ... Respondent

Mr. Sudin Usgaonkar, Advocate for the Appellant.

Respondent ex parte.

CORAM : N. A. BRITTO, J.

DATE : 23RD SEPTEMBER,2005.

ORAL JUDGMENT

This is plaintiff's second appeal arising from Special Civil Suit No.388/89/A and was admitted on several substantial questions, one of which reads as follows:-

3. Whether the Appellate Court committed illegality in overlooking that failure of the Respondent to prove Issue No.2 which was in rebuttal would pave way for suit being decreed based on the documentary evidence?

2. Some facts are required to be stated to dispose of this second appeal and the parties hereto shall be referred to in their names as they appear in the cause title of the said Civil Suit.

3. There is no dispute that the plaintiff entered into an agreement with the defendant dated 26-9-1986 agreeing to sell to the plaintiff the defendant's property known as "ARADI OF PEDEM GRANDE" having Chalta No. 17 of P.T. Sheet No.78 of City Survey of Mapusa on terms and conditions mentioned in the said agreement. In addition to the said agreement of sale, the defendant also executed a general Power of Attorney on 17-10-1986 in favour of the plaintiff. This Power of Attorney was executed to enable the plaintiff to get all relevant documents ready for execution of Sale Deed. The defendant also executed an affidavit on 17-10-1986 reiterating that she was the lonely(only?) heir. Inspite of agreeing to sell the property and further reiterating that the plot agreed to

be sold was allotted to her by her uncle one Mr. Aphy D'Souza by virtue of Deed of Exchange dated 10-3-1981 registered with the Sub Registrar of Bardez at Mapusa under No.274, it appears that thereafter there were differences between the plaintiff and the defendant and probably the defendant represented to the plaintiff that she was unable to execute the Sale Deed because her sisters had also an interest in the said property. The defendant again reiterated the said stand by her letter dated 26-9-1988 stating that the said property was jointly owned by her along with her sisters and that she could not sell her undivided share to any outsider. The defendant also showed her willingness to refund the earnest money of Rs.2,300/- advanced by the plaintiff to the defendant. The said letter dated 26-9-1988 was written by the defendant to the plaintiff in response to the plaintiff's letter dated 4-7-1988 calling upon the defendant to hand over the possession of the property within 15 days failing which he would be compelled to file a Civil Suit as well as a Criminal Case. The plaintiff then filed the Civil Suit for specific performance of the agreement of sale dated 26-9-1986 and also for permanent injunction to restrain the defendant from selling the said plot to others. The defendant contested the suit and the learned trial Judge framed 3 issues, namely, (a) whether the plaintiff was entitled to the specific performance of the said agreement dated 26-5-86, (b) whether the defendant proved that the suit was bad for non-joinder of

necessary parties and (c) whether the defendant proves that the suit was barred by limitation.

4. After the parties led evidence, the learned trial Court by his Judgment/Order dated 31-10-1998 came to the conclusion that Issue No.1 was proved, Issue No.2 was not proved and Issue No.3 was also not proved and proceeded to decree the suit with costs.

5. The defendant having carried out an appeal to the District Court, the learned Additional District Judge by her Judgment/Order dated 6-1-2000 reversed the findings of the learned trial Court and dismissed the suit filed by the plaintiff and ordered the refund of earnest money to the plaintiff with interest at the rate of 6% till payment. In reversing the findings of the trial Court, the learned Additional District Judge observed, and in my view rightly, that the defendant had failed to establish that the documents, namely, the agreement, the Power of Attorney and the affidavit were documents executed by the plaintiff by exercise of coercion or fraud and if that is so, the learned Additional District Judge was certainly not justified in further observing that the entire transaction of getting Power of Attorney and affidavit was quite irregular if not fraudulent. The defendant had clearly stated in the agreement for sale as well as in the affidavit that

the plot to be sold was owned by her pursuant to a Deed of Exchange executed by her uncle the said Aphy D'Souza in her favour and which was by virtue of a registered document and if that is so, one fails to understand as to how the defendant could forward a plea in her written statement that the plot to be sold was also owned by her sisters. In fact, none of the sisters had come forward to support the case of the defendant that they had any share in the plot to be sold and once the learned trial Court had rendered a finding regarding Issue No.2 in the negative, namely, that there was no evidence that the suit plot to be sold belonged to the defendant along with her sisters or the sisters were required to be joined in the suit there was no question of denying the plaintiff the relief sought by him. In fact, the learned Additional District Judge has proceeded on surmises and conjectures. The defendant had clearly represented to the plaintiff that she was exclusive owner of the plot which was agreed to be sold by virtue of Deed of Exchange executed by her uncle in her favour and being so, the learned trial Court had rightly rejected her plea that her other sisters had any claim over the plot agreed to be sold. Once, the learned trial Judge had held that the defendant had failed to prove that her sisters had also any right or interest in the said plot agreed to be sold there was no other option but to have decreed the suit which the learned trial Judge had rightly done

and which finding the learned Additional District Judge reversed on mere surmises and conjectures.

6. The substantial question reproduced hereinabove has to be answered in favour of the plaintiff. Consequently, this second appeal succeeds and as a result, the Judgment/Order of the learned Additional District Judge dated 6-1-2000 is set aside and that of the learned Civil Judge dated 31-10-1998 is restored. Considering the facts, there will be no order as to costs.

N. A. BRITTO, J.

RD.